84-530

Office-Supreme Court, U.S.
FILED
SEP 6 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term 1984

No.————

ROMAN WELYCZKO,

Petitioner,

-against-

U.S. AIR, INC. and THOMAS POMEROY as CHAIRMAN OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL NO. 75, DISTRICT NO. 141,

Respondents.

PETITIONER FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

Respectfully submitted by:
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MARTIN WEINSTEIN, A member of this Bar, on behalf of

RICHARD P. WALSH, JR. and
MICHAEL T. MC GARRY, ESQS.

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.1. (a) Questions presented for review

In DelCostello v. International Brotherhood of Teamsters, et al., ___ US___, 103, S.Ct. 2281, 76 L.Ed.2d 476 (1983), the United States Supreme Court announced a new, uniform, federal limitations period governing the hybrid cause of action based on an employer's wrongful discharge and a union's breach of its duty of fair representation.

Is this new limitations period to be applied retroactively or is there a presumption of prospective application only?

If the new limitations period is to be applied retroactively, is it to

be applied retroactively in each and every instance?

If not, what bases are to be used in determining whether or not to apply said limitations period retroactively in given situations?

Should the test for retroactive application of this new law be the test announced by the Supreme Court in Chevron Oil Co. v. Huson, 404 US 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971)?

If so, does not the predicament of the instant petitioner, Roman Welyczko, satisfy the Chevron test to the extent that the new limitations period should not, as to his circumstances, be retroactively applied?

In 1975 and within the Second Circuit, did Roman Welyczko have a

right to rely on a limitations period for the pertinent causes of action? If so, what limitations period did he have a right to rely on?

If not, why did he not have a right to rely on a limitations period? If he had such a right but lost it, why and at what point did he lose it?

Regarding the Second Circuit decision now sought to be appealed, why was the Chevron test not applied to petitioner's case?

In view of the fact that the appeal to the Second Circuit emanated from the Northern District Court's granting summary judgment in favor of defendants' motions, did the Second Circuit erroneously and unfairly rely on the facts as stated by the

defendants instead of relying on the facts as presented by the plaintiff?

Regarding the instant petitioner, Roman Welyczko, is it not true that:

-in 1975 he had a right to rely on the six-year limitations period as established by the Second Circuit in 1970 in Abrams v. Carrier Corporation, 434 F2d 1234, cert. den. 401 US 1009, 91 S.Ct. 1253, 28 L.Ed. 2d 454?

-as to Welyczko's situation, the new law announced in 1983 was unforeseeable?

-no law will be furthered by the retroactive application of DelCostello in this instance; rather, the substantive laws will be retarded by the retroactivity?

-petitioner had every right to rely on his union's assurances that it would request the special hearing on his behalf and later, on his union's assurances that it had filed the request on his behalf? As such, is it not true that, through no fault of his own, the federal courts represent petitioner's only forum for redress?

-retroactive application of the new and shorter limitations period in this case would be unfair and unjust?

-in view of the foregoing, petitioner satisfies the Chevron test so that DelCostello should not be retroactively applied in this particular case?

If petitioner had a right to rely on the six-year limitations period, did not his right to his causes of action become a vested right when he timely sued thereunder? As such, are questions of constitutional due process raised by the retroactive application of the new and shorter limitations period, which new limitations period did not become law until some two years after petitioner had commenced his action?

Should the United States Supreme Court resolve the conflict that now exists among the various Circuit Courts regarding the retroactive application of DelCostello?

If if does not resolve said conflicts, is uniformity possible among the Circuit Courts?

Was not uniformity a desired goal in the DelCostello decision?

(b) Plaintiff - Roman Welyczko

Defendants - U.S. Air, Inc.

- Thomas Pomeroy as Chairman of the International Association of Machinists and Aerospace Workers, Local No. 75, District No. 141

(c) Table of Contents

	Page
Statement of Jurisdiction	i,ii
Statutes	ii
Statement of Facts	1-7
Reasons for the Writ	7-16

Table of Authorities Page

Abrams v. Carrier Corporation, 434 F2d 1234, cert. den. 401 US 1009, 91 S.Ct. 1253, 28 L.Ed.2d 545 (1971) supra

Chevron Oil Co. v. Huson 404 US 97, 92 S.Ct. 349, 30 L. Ed.2d 296 (1971) throughout

Curtis v. Int'l Brotherhood of Teamsters, 716 F2d 360 (6th Cir. 1983) (per curiam) 8

DelCostello v. International Brotherhood of Teamsters, et al., ____US____, 103 S. Ct. 2281, 76 L.Ed.2d 476 (1983) throughout

Edwards v. Sea-Land Service, Inc., 720 F.2d

857 (5th Cir. 1983) 8

Edwards v. Teamsters Local No. 36, 719 F.2d 1036 (9th Cir. 1983), cert. den. 104 S.Ct. 1599 (1984) 8

Hand v. Int'l Chemical Workers Union, 712 F.2d 1350 (11th Cir. 1983) 8

Lincoln v. District 9 of the Int'l Ass'n of Machinists and Aerospace Workers, 723 F.2d 627 (8th Cir. 1983) 8

Murray v. Branch Motor Express Co., 723 F.2d 1146 (4th Cir. 1983) 8

Perez v. Dana Corp.

Parish Frame Division,
718 F.2d 581 (3rd Cir.
1983) 7

Storck v. Int'l
Brotherhood of Teamsters,
Local Union No. 600, 712
F.2d 1194 (7th Cir. 1983)
(per curiam) 8

Table of statutes Page

Section 301 Labor Rela-
tions Act, 29U.S.C. Section
185(a) ii

Railway Labor Act, 45
U.S.C. Section 141 et seq. ii

(d) Decision of Northern District, November 1, 1983 unreported decision of Secton Circuit Court of Appeals, April 25, 1984 (cite not

known).

(e) (i) Date of Judgment and entry - April 25, 1984.

(ii) Date of order denying rehearing - June 8, 1984.

(iii) Not applicable.

(iv) Section 301 Labor Management Relations Act, 29 U.S.C. Section 185(a).

(f) Section 301 Labor Management Relations Act, 29 U.S.C. Section 185(a).

Railway Labor ACt, 45 U.S.C. Section 141 et seq.

4th and 14th Amendments of the U.S. Constitution.

Petitioner, Martin Weinstein, duly admitted to practice law in this Court, as and for a petition on behalf of Roman Welyczko and his counsel, Lombardi, Reinhard, Walsh & Harrison, P.C., and upon information and belief, does hereby allege:

(g) Statement of facts

In 1975 petitioner was a machinist employed by Allegheny Airlines, now U.S. Air, Inc. In that year petitioner sustained a serious accidental injury and was awaiting major hip replacement surgery pending resolution of a serious infection which was complicating the matter.

On May 5, 1975, petitioner was granted a ninety-day medical leave of absence pursuant to Article 10 of the collective bargaining agreement

between his employer, U.S. Air, and his union, Local No. 75, District 141 of the International Association of Machinists and Aerospace Workers.

On or about June 9, 1975, petitioner was notified by his employer that an extension of his medical leave would require an additional request within the ninety days.

On or abut July 31, 1975, petitioner sent the employer the additional request for an extension of his medical leave. Having received no response by August 3, 1975, petitioner sent a telegram to his employer repeating the request for an extension.

On or about August 6, 1975, the employer acknowledged receipt of said

request, and advised petitioner that approval for extended medical leave would require corroboration from a doctor's office.

Petitioner's doctor was away on vacation when petitioner attempted to secure the necessary letter. The doctor's secretary, knowing that the petitioner's medical condition had not changed and assuming that any letter would have to include the doctor's signature, sent to the employer a copy of the doctor's report dated May 5, 1975, in which the doctor had recommended an indefinite medical leave of absence.

Thereafter, on or about August 27, 1975, and without any demand to return to work, petitioner received

notice that his employment had been terminated as of August 5, 1975.

On or before September 1, 1975, petitioner made a request to his union to arrange a special hearing pursuant to Article 14, Section D of the collective bargaining agreement. This Section permitted a special hearing to be requested by either the employee, or by the union on behalf of the employee.

Both before and after the passing of the time limit for the filing of the request for the special hearing, the union made repeated assurances to petitioner that it would institute, and that it had instituted, the request on his behalf.

Had the Union informed petitioner that it would not process the matter,

petitioner would have had the right to process the request himself on his own behalf.

The availability of the collectively-bargained grievance process thus being foreclosed to him by the union's failure to timely file, petitioner sought his last resort for redress in the court system by commencing this action in the Supreme Court of the State of New York on or about March 13, 1981.

On or about June 18, 1981, defendants removed the action to the United States District Court, Northern District of New York.

The basis of federal court jurisdiction is that the instant causes of action, wrongful discharge by an employer and breach of the duty

of fair representation by a union, are federal causes of action. This is a hybrid claim under Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185(a).

In 1983, after the Supreme Court's DelCostello decision, defendants moved the Northern District Court for summary judgment based on the defense of plaintiff's failure to timely file within the new limitations period.

In ruling from the bench on November 1, 1983, the Honorable Howard G. Munson, Chief Judge, granted defendants' motions.

An appeal to the United States Court of Appeals for the Second Circuit resulted in affirmance in an opinion dated April 25, 1984.

Subsequently, a petition seeking rehearing was denied by order dated June 8, 1984.

(h) Not applicable.

(i) Section 301 Labor Mangement Relations Act, 29 U.S.C. Section 185(a); federal case law establishing the hybrid claims as a federal cause of action involving concurrent jurisdictions in state and federal courts.

(j) Reasons to allow the writ

The Ninth Circuit refuses to apply DelCostello retroactively. Edwards v. Teamsters Local No. 36, 719 F.2d 1036 (9th Cir. 1983), cert. denied, 104 S.Ct. 1599 (1984).

Other circuits favor retroactivity: Perez v. Dana Corp.,

Parish Frame Division, 718 F.2d 581 (3rd Cir. 1983); Murray v. Branch Motor Express Co., 723 F.2d 1146 (4th Cir. 1983); Edwards v. Sea-Land Service, Inc., 720 F.2d 857 (5th Cir. 1983); Curtis v. Int'l Brotherhood of Teamsters, Local 299, 716 F.2d 360 (6th Cir. 1983) (per curiam) (dictum); Storck v. Int'l Brotherhood of Teamsters, Local Union No. 600, 712 F.2d 1194 (7th Cir. 1983) (per curiam); Lincoln v. District 9 of the Int'l Ass'n of Machinists and Aerospace Workers, 723 F.2d 627 (8th Cir. 1983); Hand v. Int'l Chemical Workers Union, 712 F.2d 1350 (11th Cir. 1983) (per curiam).

Thus the circuits were in conflict even prior to the Second Circuit's decision below. Prior to

said decision, however, all the circuits applied the Chevron test in determining the retroactivity question.

Now because the Second Circuit has declined even to apply the Chevron test, the circuits are in further conflict.

If the Second Circuit is presuming retroactive application of DelCostello in each and every instance, then it is in conflict with those circuits which use the Chevron test to make the retroactivity determination.

DelCostello represents new law with no explicit directive regarding the retroactivity question. As such, the Chevron test must be applied to each plaintiff's particular

circumstance to determine whether, as to each given plaintiff, retroactive application of the new and shorter limitations period is appropriate and fair.

The retroactive application of a new and shorter limitations period is inherently repugnant to this system of jurisprudence, bearing the obvious seeds of potential abuse. The critical prong of the Chevron test should be whether the federal courts represent the plaintiff's first and only forum. In all the other aforementioned circuits, the plaintiffs all enjoyed some formal resolution of their grievances within the collective bargaining grievance process. The only resolution of the instant petitioner's grievance

occurred when the union inexplicably failed to timely file the grievance on his behalf, thus foreclosing to petitioner the use of the labor forum. Access to the federal forum in this circumstance should not lightly be foreclosed by the retroactive application of the new six-months limitations period, which new limitations period was not revealed to the petitioner until some two years after he timely filed suit.

As a note, had the Chevron test been applied to DelCostello, DelCostello's situation would probably have warranted retroactive application anyway, as that plaintiff would not have satisfied the third prong of the test, having already enjoyed a

resolution of his grievance within the labor forum.

Legislatures which enact laws pronouncing new and shorter limitations periods are quick to protect existing causes of action which had been timely sued under the previous limitations period, and even those which arose prior to the new law and which had not yet been commenced. Simply because a federal court, albeit the Supreme Court, has engaged in judicial legislation, should not change this legislative precept involving the protection of existing causes of action already commenced. What assurances are there, otherwise, that any limitations period can be relied on?

Respectfully, the Supreme Court should clarify the retroactivity debate regarding DelCostello.

As mentioned, the circuits are in disagreement as to whether or not to apply the Chevron test.

Additionally, the circuits applying the Chevron test are in disagreement as to how the test should be applied.

Some circuits point to the developing caselaw leading up to DelCostello and say that DelCostello is not "new law" under Chevron (the first prong of the test.) Other circuits assess the situation of the individual plaintiff to determine whether or not DelCostello represents "new law" under Chevron as to that plaintiff, by determining whether the

plaintiff could have reasonably relied on the limitations period he sued under, or whether the plaintiff would be held to have foreseen the DelCostello decision. Different plaintiffs will be entitled to different degrees of reliance upon prior limitation periods.

Regarding the second prong of the Chevron test, i.e. whether the retroactive application of the new law will further or retard its operation, some circuits look to the new limitations period while others look to the underlying substantive causes of action.

The third prong of the Chevron test asks the question whether or not retroactive application in a given case would be unfair or unjust,

emphasizing the unfairness if the federal courts represent to a given plaintiff his only forum for redress.

When the federal courts represent a plaintiff's only forum in these particular situations, retroactive application of DelCostello effectively serves to deny to a plaintiff any forum at all, thereby denying the right of the plaintiff to sue his causes of action at all. The Supreme Court, respectfully, should determine whether a plaintiff who timely sued under a previous limitations period had secured a vested right to his causes of action, particularly when, through no fault of his own, he did not have access to the grievance procedures within the labor forum. Are there implications of a violation

of constitutional due process should Walyczko, through no fault of his own, be denied any forum at all?

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROMAN WELYCZKO,

vs. 81-CV-631

U.S. AIR, INC, and THOMAS POMEROY as CHAIRMAN of THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL NO. 75 and DISTRICT NO. 141.

TRANSCRIPT OF DECISION OF MOTION

in the above-entitled matter by Hon. Howard G. Munson, Chief United States District Judge for the Northern District of New York on the 1st day of November 1983 at the United Sates Courthouse, Albany, New York.

APPEARANCES:

LOMBARDI, REINHARD, WALSH &
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Schenectady, New York
Attorneys for Plaintiff
BY: MICHAEL T. MC GARRY, ESQ.

WHITEMAN, OSTERMAN & HANNA, ESQS.
Attorneys for defendant, U.S. Air
BY: MELVIN OSTERMAN, ESQ.

CONSTANCE ANGELINI, Attorney for
Thomas Pomeroy and the
International Association of
Machinists and Aerospace
Workers, Local No. 75 and
District No. 141

THE COURT: All right. Well, I have read the Pitts versus Frito-Lay case. I think that that is a little irrelevant of this situation for two reasons. Number one, it came out before DelCostello, and number two, there is no question but what in that case the Sixth Circuit applied the pre-existing law in the Sixth Circuit, and it appears to me that that case is in opposite to the Second Circuit, because in the Sixth Circuit the law was settled, and in the Second Circuit I'm not certain that it was. If fact, I think it was not.

And so it appears to me that the Chevron test cannot be satisfied in this circuit.

I realize that under some circumstances this causes a problem,

but it seems to me that the Rule 15 motion to amend the complaint should be granted and the motion for summary judgment by the plaintiff should be granted, and I do so at this time.

CERTIFICATION

I, George T. McGloine, Official Court Reporter for the United States District Court, in and for the Northern District of New York, do certify this to be a true and accurate transcript of the stenographic record of the foregoing, taken at the time and place noted in the heading hereof, to the best of my knowledge and belief.

George T, McGloine
Office Court Reporter
United States District Court
Northern District of New York

Albany, New York

January 11, 1984

UNITED STATES COURT OF APPEALS
For the Second Circuit

*

No. 999-August Term 1983

(Argued March 30, 1984
Decided April 25, 1984)

Docket No. 83-7976

*

ROMAN WELYCZKO,

Plaintiff-Appellant,

-against-

U.S. AIR, INC. and THOMAS POMEROY as CHAIRMAN of the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, Local No. 75, District 141,

Defendants-Appellees.

*

BEFORE:

KAUFMAN, KEARSE, AND PIERCE,

Circuit Judges

*

Appeal from a Judgment of the

United States District Court for the

Northern District of New York, Howard G. Munson, Chief Judge, granting appellees' motions to dismiss appellant's complaint under Section 2 of the Railway Labor Act, 45 U.S.C. Section 152, as barred by the statute of limitations.

Affirmed.

MICHAEL T. MC GARRY, Albany, N.Y. (Lombardi, Reinhard, Walsh & Harrison, Albany, N.Y., of Counsel), for Plaintiff-Appellant

MELVIN H. OSTERMAN, JR., Albany, N.Y., (Whiteman, Osterman & Hanna, Albany, N.Y., of Counsel), for Defendant-Appellee, U.S. Air, Inc.

PETER P. PARAVATI, Utica, N.Y. (Constance J. Angelini, of Counsel), for Defendant-Appellee, Thomas Pomeroy.

KAUFMAN, Circuit Judge:

Roman Welyczko appeals from the dismissal cf his hybrid claim against his employer for wrongful discharge, and against his union for breach of its duty of fair representation. The district judge based his action upon the Supreme Court's decision in DelCostello v. International Brotherhood of Teamsters, ___U.S.___, 103 S.Ct. 2281 (1983), which established a six-month statue of limitations for claims under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. Section 185(a). We hold that the DelCostello decision has both retroactive and prospective application, and therefore affirm the dismissal of Welyczko's complaint.

I

We shall briefly review the facts. The parties have agreed that Welyczko was an employee of U.S. Air, Inc. ("U.S. Air") and that the terms and conditions of his employment were governed by a collective bargaining agreement between U.S. Air and the International Association of Machinists and Aerospace Workers ("IAM"). Welyczko was granted a 90-day medical leave of absence on May 5, 1975. On or about July 31 of that year, he wrote to his employer requesting an extension of leave. He reiterated that request by telegram on August 3. Approximately three days later, Welyczko received a letter from a U.S. Air executive, notifying him that his request for extended leave

would be considered only upon receipt of corroboration from a physician that additional leave was necessary. Because his doctor was then on vacation, Welyczko decided to forward to U.S. Air a second copy of the physician's note, dated May 5. This document had accompanied his original application for leave.

U.S. Air refused to accept the copy as adequate substantiation. Accordingly, when Welyczko did not return to work, the company terminated his employment on august 26, 1975. This discharge was made retroactive to August 5, the day his authorized leave expired. Welyczko responded by requesting an officer of the IAM to arrange a special hearing on his discharge, pursuant to the collective

bargaining agreement. The IAM contradicts this by replying that Welyczko was advised that he himself would have to make a written request for such hearing. In any event, the hearing was never held, and the discharge action became final.

The instant suit was commenced in New York State Supreme Court on March 5, 1981, and was subsequently removed to federal court. After DeCostello was decided, appellees moved for summary judgment asserting that the statute of limitations adopted in that case should apply retroactively to Welyczko's cause of action, which accrued in 1975. On November 1, 1983, in a ruling from the bench, Chief Judge Munson granted the motion.

Welyczko appeals.

II

In DelCostello, the Supreme Court decided that a uniform federal statute of limitations should apply to claims under Section 301 of the LMRA. In the absence of an expressly applicable federal limitations period, the Court acknowledged, the "most closely analogous statute of limitations under state law" would normally govern. 103 S.Ct. at 2287. The Court concluded, however, that the "federal policies at stake and the practicalities of litigation make (federal law) a significantly more appropriate vehicle for interstitial lawmaking" in this instance. Id. at 2294. It therefore held that the six-month time limit on unfair labor practice complaints under

Section 10(b) of the National Labor Relations Act applied to Section 301 claims as well.

Welyczko's claim must be construed as arising under the Railway Labor Act, 45 U.S.C. Section 151 et seq., which govern air carriers in lieu of the LMRA. See 29 U.S.C. Sections 142, 152; 45 U.S.C. Section 181. We agree with the Ninth Circuit, however, that this distinction is "without import." Barina v. Gulf Trading and Transportation Co., 726 F.2d 560,563 n.6 (9th Cir. 1984). The same policies which led the Supreme Court to apply a federal statute of limitations to claims under Section 301 of the Labor Management Relations Act apply with equal force to

substantively identical claims under the Railway Labor Act.

We have already applied the DelCostello rule retroactively, although the issue was not specifically discussed. Assad v. Mount Sinai Hospital, 703 F.2d 36 (2d Cir.), vacated, 104 S.Ct. 54 (1983), on remand, 725 F.2d 837 (1984). Our action there was consistent with the "general rule of long standing" that "judicial precedents normally have retroactive as well as prospective effect." National Association of Broadcasters v. FCC, 554 F2d 1118, 1130 (D.C. Cir. 1976), quoted in Kremer v. Chemical Construction Corp., 623 F.2d 786,788 (2d Cir. 1980), aff'd, 456 U.S. 461 (1982). All but one of the circuits considering

the retroactivity of DelCostello have reached the same result. Perez v. Dana Corp., Parish Frame Division., 718 F.2d 581 (3rd Cir. 1983); Murray v. Branch Motor Express Co., 723 F.2d 1146 (4th Cir. 1983); Edwards v. Sea-Land Service, Inc., 720 F.2d 857 (5th Cir. 1983); Curtis v. Int'l Brotherhood of Teamsters, Local 299, 716 F.2d 360 (6th Cir. 1983) (per curiam) (dictum); Storck v. Int'l Brotherhood of Teamsters, Local Union No. 600, 712 F.2d 1194 (7th Cir. 1983) (per curiam); Lincoln v. District 9 of the Int'l Ass'n of Machinists and Aerospace Workers,723 F.2d 627 (8th Cir. 1983); Hand v. Int'l Chemical Workers Union, 712 F.2d 1350 (11th Cir. 1983) (per curiam); contra, Edwards v. Teamsters Local

No. 36, 719 F.2d 1036 (9th Cir. 1983), cert. denied, 104 S.Ct. 1599 (1984).

III

Appellant urges us to carve out an exception to the retroactivity principle so that his claim may proceed, arguing that under the three-factor test articulated by the Supreme Court in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), the DelCostello holding should be given only prospective application. Most of the authorities just cited, however, applied the Chevron test and found that DelCostello should be applied retroactively, See Perez v. Dana Corp., Parish Frame Division, supra, 718 F.2d at 584-85; Murray v. Branch Motor Express Co., supra (adopting reasoning of Perez); Edwards v. Sea-

Land Service, Inc., supra, 720 F.2d at 860-62; Lincoln v. District 9 of the Int'l Ass'n of Machinists and Aerospace Workers,, supra, 723 F.2d at 629-30. Moreover, in our view of this case does not present circumstances in which the use of the Chevron test would be appropriate.

Were we asked to decide if retrospective effect should be given to a new rule which our court had pronounced, the policy factors enumerated in Chevron Oil would indeed be determinative. See United States v. Fitzgerald, 545 F.2d 578, 582 (7th Cir. 1976). Similarly, had the Supreme Court given no indication whether DelCostello should apply retroactively, a Chevron Oil analysis would also be in order. But these

factors are not present here. The Supreme Court not only adopted a new statute of limitations in DelCostello; it applied that time bar retroactively to govern the very claim at issue in the case before it. We have noted that "the Supreme Court is well aware of how to avoid the effects of applying one of its rulings retroactively to the case at bar."

Cates v. Trans World Airlines, Inc., 561 F.2d 1064, 1073 (2d Cir. 1977). Thus, when that Court itself has given retrospective application to a newly-adopted principle, "no sound reason exists for not doing so here." Holzsager v. Valley Hospital, 646 F2d 792,797 (2d Cir. 1981). A court of Appeals must defer to the Supreme Court's directive on this issue,

explicit or implicit. See United States v. Fitzgerald, Supra, at 582. Certainly, its intended application is clear in this case.

We therefore decline appellant's invitation to exclude his suit from the DelCostello holding. Rather, we adopt for this circuit the rule that in employment termination cases, a six-month statute of limitations applies both retroactively and prospectively to wrongful discharge/failure to represent claims. Because Welyczko's complaint was filed more than five years after his termination, it is clearly time-barred. Accordingly, we affirm the judgment of the district court dismissing Welyczko's complaint.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 8th day of June, one thousand nine hundred and eighty-four.

ROMAN WELYCZKO,

Plaintiff-Appellant,

-against-

U.S.AIR, INC. and THOMAS POMEROY AS CHAIRMAN OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the Plaintiff-Appellant, Roman Welyczko,

Upon consideration by the panel that heard the appeal, it is

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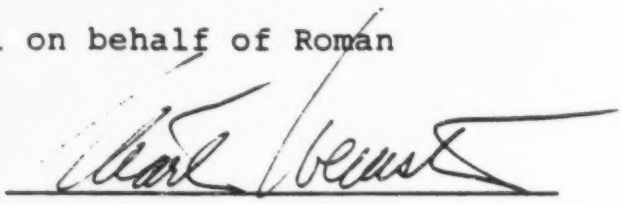
Ordered that said petition for rehearing is DENIED.

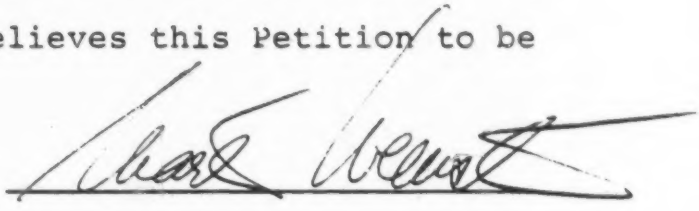
It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

WHEREFORE, petitioner respectfully requests that the United States Supreme Court grant the Writ of Certiorari on behalf of Roman Welyczko.



MARTIN WEINSTEIN, being duly sworn deposes and says that he has read the foregoing and that upon information and belief it is true to his knowledge as related by Lombardi, Reinhard, Walsh & Harrison, P.C., and that he believes this Petition to be true.



Sworn to before me this

21st day of September, 1984

Notary Public

3/30/85

Office-Supreme Court, U.S.
FILED
NOV 5 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-530 (2)

IN THE

Supreme Court of the United States

October Term, 1984

ROMAN WELYCZKO,

Petitioner,

against

USAIR, INC. and THOMAS POMEROY as Chairman of the International Association of Machinists and Aerospace Workers, Local No. 75, District No. 141,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief for Respondent USAir, Inc. in Opposition

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November 2, 1984

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11pp

Questions Presented

The Questions Presented are adequately set forth in the Petition for a Writ of Certiorari ("Petition").

Table of Contents*

	Page
Questions Presented	i
Table of Authorities	iii
Statement of the Case	2
Reasons for Denying the Writ	3
I. The Second Circuit correctly held that the rule in *DelCostello* is to be applied to pending actions	3
II. The issue presented is insubstantial	4
III. The result sought by Welyczko would be inconsistent with the Court's decision in *DelCostello*	5
Conclusion	6

*Pursuant to Rule 28.1, respondent USAir, Inc. states that it and USAir Finance, N.V., are wholly owned subsidiaries of USAir Group, Inc.

Table of Authorities

CASES:

	Page
Barina v. Gulf Trading and Transportation Co., 726 F.2d 560 (9th Cir. 1984)	2
Curtis v. International Brotherhood of Teamsters Local 299, 716 F.2d 360 (6th Cir. 1983)	3
DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983)	*passim*
Edwards v. Sea-Land Service, Inc., 720 F.2d 857 (5th Cir. 1983)	3
Edwards v. Teamsters Local Union No. 36, 719 F.2d 1036 (9th Cir. 1983), *cert. denied,* 104 S. Ct. 1599 (1984)	3, 4
Erkins v. United Steel Workers, 723 F.2d 837 (11th Cir.), *cert. denied,* 104 S. Ct. 3517 (1984)	3, 4
Ernst v. Indiana Bell Telephone Co., 717 F.2d 1036 (7th Cir. 1983), *cert. denied,* 104 S. Ct. 707 (1984)	4
Flowers v. United Steel Workers, 671 F.2d 87 (2d Cir. 1982), *rev'd,* 462 U.S. 151 (1983)	5
Graves v. Smith's Transfer Corp., 736 F.2d 819 (1st Cir. 1984)	3
Lincoln v. District 9, International Association of Machinists, 723 F.2d 627 (8th Cir. 1983)	3

Page

McNaughton v. Dillingham Corp., 722 F.2d 1459 (9th Cir. 1984), *cert. denied*, No. 83-1739 (U.S. Oct. 15, 1984) 4

Metz v. Tootsie Roll Industries, Inc., 715 F.2d 299 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 976 (1984) 3, 4

Murray v. Branch Motor Express Co., 723 F.2d 1146 (4th Cir. 1983), *cert. denied*, No. 83-1967 (U.S. Oct. 15, 1984) 3, 4

Perez v. Dana Corp., 718 F.2d 581 (3d Cir. 1983) ... 3

Rogers v. Lockheed-Georgia Co., 720 F.2d 1247 (11th Cir. 1983), *cert. denied*, No. 83-1958 (U.S. Oct. 15, 1984) 4

No. 84-530

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ROMAN WELYCZKO,

Petitioner,

against

USAIR, INC. and THOMAS POMEROY as Chairman of the International Association of Machinists and Aerospace Workers, Local No. 75, District No. 141,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief for Respondent USAir, Inc. in Opposition

Respondent USAir, Inc. ("USAir") respectfully requests the Court to deny the petition for a writ of certiorari to review the judgment, opinion and order of the United States Court of Appeals for the Second Circuit in this case.

Statement of the Case

Petitioner Roman Welyczko was terminated from his employment with Respondent USAir on August 27, 1975, retroactive to August 4, for failure to provide requested substantiation of his request for an extension of a 90 day medical leave. Welyczko alleges that he orally requested representatives of his union, the International Association of Machinists and Aerospace Workers ("IAM"), to file a grievance on his behalf, which was never done. On March 6, 1981, five and one-half years later, Welyczko commenced this action, alleging wrongful discharge by USAir and the breach of the duty of fair representation by the IAM.

In June of 1983, ending a long period of uncertainty, the Court determined in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), that the six-month statute of limitations provided by section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1970), should be applied to an employee's suit against his or her employer and union under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976). Although Welyczko's claims must be construed as arising under the Railway Labor Act, 45 U.S.C. §§ 151-188 (1970), Welyczko does not contend that this distinction is meaningful. *See* Petitioner's App. at 29-30. *See also Barina v. Gulf Trading and Transportation Co.*, 726 F.2d 560, 563 n.6 (9th Cir. 1984).

The sole issue Welyczko seeks to bring before the Court, apparently, is his claim that the rule derived from the Court's decision in *DelCostello* may not be applied to his cause of action.

Reasons for Denying the Writ

I.

The Second Circuit correctly held that the rule in *DelCostello* is to be applied to pending actions.

The issue Welyczko seeks to bring before the Court, whether the rule in *DelCostello* is to be applied to pending actions, is one that has been addressed, and resolved adversely to Welyczko, by the United States Court of Appeals for the Second Circuit in this case, and by the Courts of Appeals for the First (*Graves v. Smith's Transfer Corp.*, 736 F.2d 819 [1st Cir. 1984]); Third (*Perez v. Dana Corp.*, 718 F.2d 581 [3d Cir. 1983]); Fourth (*Murray v. Branch Motor Express Co.*, 723 F.2d 146 [4th Cir. 1983], *cert. denied*, No. 83-1967 [U.S. Oct. 15, 1984]); Fifth (*Edwards v. Sea-Land Service, Inc.*, 720 F.2d 857 [5th Cir. 1983]); Sixth (*Curtis v. International Brotherhood of Teamsters Local 299*, 716 F.2d 360 [6th Cir. 1983] [dictum]); Seventh (*Metz v. Tootsie Roll Industries, Inc.*, 715 F.2d 299 [7th Cir. 1983], *cert. denied*, 104 S. Ct. 976 [1984]); Eighth (*Lincoln v. District 9, International Association of Machinists*, 723 F.2d 627 [8th Cir. 1983]), and Eleventh (*Erkins v. United Steel Workers*, 723 F.2d 837 [11th Cir.], *cert. denied*, 104 S. Ct. 3517 [1984]) Circuits. Only the Ninth Circuit has declined to apply the *DelCostello* rule in pending cases, *see, e.g., Edwards v. Teamsters Local Union No. 36*, 719 F.2d 1036 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1599 (1984); and that court perceived a justification peculiar to that circuit for its refusal. *See Edwards*, 719 F.2d at 1040.

Each of these courts considered the issue now raised by Welyczko, and each concluded that departure from the principle that judicial decisions have retrospective as well as prospective effect would, in light of the policies articulated by the Court in *DelCostello*, be inappropriate. The only point asserted by Welyczko to be peculiar to his case is that no grievance was initiated on his behalf. Petition, 10-11. That, however, is insufficient to distinguish his case or to warrant a different result. No principle of law or national labor relations policy mandates that an evidentiary hearing be held with respect to every grievance.

II.

The issue presented is insubstantial.

On at least seven occasions the Court has declined to review decisions concerning the application of the rule in *DelCostello* to pending actions. *See Erkins v. United Steel Workers*, 723 F.2d 837 (11th Cir.), *cert. denied*, 104 S. Ct. 3517 (1984); *Murray v. Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir. 1983), *cert. denied*, No. 83-1967 (U.S. Oct. 15, 1984); *McNaughton v. Dillingham Corp.*, 722 F.2d 1459 (9th Cir.), *cert. denied*, No. 83-1739 (U.S. Oct. 15, 1984); *Rogers v. Lockheed-Georgia Co.*, 720 F.2d 1247 (11th Cir. 1983), *cert. denied*, No. 83-1958 (U.S. Oct. 15, 1984); *Edwards v. Teamsters Local Union No. 36*, 719 F.2d 1036 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1599 (1984); *Ernst v. Indiana Bell Telephone Co.*, 717 F.2d 1036 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 707 (1984); *Metz v. Tootsie Roll Industries, Inc.*, 715 F.2d 289 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 976 (1984). Welyczko has presented no novel issue or unique circumstance sufficient to distinguish this case from those that the Court previously has declined to consider.

III.

The result sought by Welyczko would be inconsistent with the Court's decision in *DelCostello*.

The result sought by Welyczko would be inconsistent with action previously taken by the Court in reversing *Flowers v. United Steel Workers*, 671 F.2d 87 (2d Cir. 1982), *rev'd* 462 U.S. 151 (1983), decided as a companion case to *DelCostello*. In *Flowers*, the Court reversed the United States Court of Appeals for the Second Circuit and dismissed the complaint as untimely under the simultaneously announced rule. Because the Court has already applied the *DelCostello* rule to a cause of action from the Second Circuit, Welyczko is effectively requesting the Court to reconsider its determination in *DelCostello* or to grant preferential treatment to his own particular claim.

Conclusion

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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